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**IN THE
COURT OF APPEALS OF INDIANA**

MITZI RUTH STEPHENS n/k/a
MITZI RUTH ELLIOTT,

Appellant-Plaintiff,

vs.

KEVIN RAY STEPHENS,

Appellee-Respondent.

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No. 42A01-0609-CV-386

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-9001-DR-15

June 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Mitzi Elliott appeals the trial court's Order finding that she owes \$3,397.46 to Kevin Stephens for her portion of her daughter's college expenses. Elliott raises the sole issue of whether the trial court improperly failed to find that she has complied with a previously issued Order directing her to pay this amount. Concluding that Elliott has failed to demonstrate that the trial court improperly issued its Order, we affirm.

Facts and Procedural History

Elliott and Stephens married on April 12, 1979. The marriage was dissolved on April 16, 1990. During their marriage, they had two children, Jason and Savannah. On June 11, 2003, Jason was emancipated, Stephens became Savannah's primary physical custodian, and Elliott was ordered to pay \$135 per week in child support. When Savannah graduated from high school, Elliott stopped paying child support. On July 26, 2005, Stephens filed a Verified Motion for Contempt Citation against Elliott for failure to pay child support. On October 21, 2005, Elliott filed a Motion for Modification of Child Support, and on November 10, 2005, she filed a "Request for Arrearage Determination and Amended Motion for Modification of Child Support and Petition for College Expenses." On November 23, 2005, Stephens filed a "Motion to Dismiss and Motion to Deny in Response to Mitzi's Request for Arrearage Determination." On January 10, 2006, the trial court held a hearing on all matters.

On February 21, 2006, the trial court issued an order on the pending motions (the "Original Order"). The only part of the Original Order relevant to this appeal is the trial court's assignment of Savannah's college expenses. During the summer of 2005, Savannah took some classes at Vincennes University. She enrolled at the University of Southern

Indiana (“USI”) in the Fall semester of 2005, and at the time of the January hearing, was enrolled and had begun classes for the Spring semester. At this hearing, Stephens testified that he had already paid for all of Savannah’s Fall semester expenses and most of her Spring semester expenses. The Original Order contains the following provision regarding Stephens and Elliott’s responsibility for Savannah’s college expenses.

The Court determines that the Petitioner/Mother’s Petition for College Expenses is hereby GRANTED. The Court determines that the Petitioner/Mother shall be responsible for the sum of one thousand six hundred ninety-eight dollars and seventy-three cents (\$1,698.73) of Savannah’s post-secondary education expenses each semester and that Respondent/Father shall be responsible for two thousand seven hundred three dollars and twenty-seven cents (\$2,703.27) of Savannah’s post-secondary education expenses each semester commencing with the Fall 2005 semester. The Court’s own College Expense calculation is attached as page 2 to Exhibit A above.¹ The Court Orders that the parents pay these expenses within a reasonable time after they are incurred.

Appellant’s Appendix at 20.

On May 11, 2006, Stephens filed a Motion to Clarify Order and Reduce Amounts Due to Judgments. In this Motion, Stephens indicated that he had received no college expense payments from Elliott. The trial court held a hearing on this Motion on August 10, 2006. Just before this hearing, Stephens received a faxed copy of a check for \$3,000 written by Elliott and payable to Direct Loans Payment Center.² Both Savannah and Stephens had taken out loans administered by Direct Loans. Apparently, Elliott wrote this check to the account in Savannah’s name. At the time of the August 10 hearing, no payments had been posted on Savannah’s account. Elliott did not appear at the hearing, and presented no evidence relating

¹ This exhibit indicates that the trial court calculated Savannah’s expenses to equal \$5,696 per semester. Stephens estimates that Savannah’s expenses actually amounted to \$7,355.39.

to these payments. Her counsel stated, in argument, that she and Elliott “did not feel or determine that Mr. Stephens had met the twenty-seven hundred dollars, so from our way of thinking instead of giving him money that he had not met his initial obligation, this money was applied to the child’s student loans.” Transcript at 102-03. Elliott’s counsel was therefore of the opinion that “any money that the Court may determine is owed back to Mr. Stephens for his portion may have to come from the child in lieu of her making these loan payments.” Id. at 103.

On August 11, 2006, the trial court issued its Order Concerning Judgments (the “Second Order”), stating in relevant part that Elliott “owes three thousand three hundred ninety-seven dollars and forty-six cents (\$3,397.46) to [Stephens] for her portion of the child’s college expenses for the Fall Semester 2005, and the Spring Semester 2006.”³ Elliott now appeals.

Discussion and Decision

Elliott argues that the Second Order constitutes a modification of the Original Order, that the trial court modified the Original Order without justification, and that Elliott relied on the Original Order to her detriment. Elliott’s arguments are based on her assumption that the evidence shows she made payments in the amount of \$3,000 to Savannah’s student loan company. However, no evidence indicates that Elliott has indeed made these payments. The only evidence admitted in the trial court related to this payment was Stephens’s testimony at

² The record does not indicate the exact date that Stephens received this copy.

³ The trial court also found that Elliott was \$5,235 in arrears on her child support obligation, and owed \$250 to Stephens’s attorney. Elliott does not challenge either of these findings.

the August hearing that just prior to the hearing, he received a copy of a check for \$3,000, but that no payment had been posted on Savannah's account. Elliott's counsel stated in argument that Elliott made payments starting on April 10, 2006, and ending on August 1, 2006. However, the unsworn statements of counsel are not evidence. Kronmiller v. Wangberg, 665 N.E.2d 624, 627 (Ind. Ct. App. 1996), trans. denied. Without Elliott's counsel's unsupported assertion that Elliott had been making payments to Savannah's account,⁴ no evidence exists that Elliott had indeed been making payments. Without such evidence, we have no way of knowing whether Elliott had in fact made any payments or whether the check discussed at the August hearing was ever actually posted to Savannah's account. By failing to demonstrate that she indeed had made any payments toward Savannah's college expenses, Elliott has failed to demonstrate that the trial court improperly determined that she owes Stephens \$3,397.46 for college expenses. Therefore, we affirm the trial court's order on this basis.

Although not necessary to our decision to affirm, we will address Elliott's argument that the Second Order constituted a modification of the Original Order, and will discuss whether Elliott's purported payments on Savannah's student loans conformed to the Original Order. For the purposes of this discussion, we will assume that Elliott actually made payments on Savannah's student loan.

Initially, we conclude that the Second Order was not in fact a modification of the Original Order. In his motion, Stephens did not ask the trial court to change any aspect of the Original Order; instead, Stephens was merely asking the trial court to enforce the terms of the

⁴ We note that had Elliott indeed been making payments since April 10, such payments would

Original Order with which Elliott had not complied. See Statzell v. Gordon, 427 N.E.2d 732, 734 (Ind. Ct. App. 1981) (recognizing custodial parent’s right to bring an action to recover expenses advanced by custodial parent where non-custodial parent failed to pay court-ordered college expenses). The Original Order identifies the parties’ respective obligations for Savannah’s college expenses. The Second Order indicates that Elliott owes Stephens the amount of her obligation for the Fall semester of 2005 and the Spring semester of 2006. Because Elliott did not pay any of Savannah’s college expenses for these two semesters, Stephens covered Elliott’s portion. Thus, the Second Order does not modify the Original Order’s requirement; instead, the trial court was merely enforcing the Original Order and reflecting that Elliott should now pay her obligation for these two semesters to Stephens, as he had already covered Elliott’s obligation. See Topolski v. Topolski, 742 N.E.2d 991, 994 (Ind. Ct. App. 2001) (by ordering that mother reimburse father for college expenses, “[t]he trial court did not modify the decree; rather, by finding [mother] in contempt, the trial court was merely enforcing its prior order”).

We next address whether Elliott’s repayment of loans advanced to Savannah conforms to the Original Order’s requirements. Elliott claims that by making payments on Savannah’s account, she “reasonably interpreted [the] prior unambiguous order and satisfied its’ [sic] requirements.” Appellant’s Brief at 7. We recognize that the Original Order did not specifically indicate that Elliott should have reimbursed Stephens for the expenses he had already advanced, but we disagree that Elliott’s repayment of Savannah’s student loans satisfies the Original Order.

presumably have been posted to Savannah’s account by the time of the August hearing.

Exhibit A of the Original Order indicates that, each semester, Savannah is responsible for \$1,294 of her college expenses, Elliott is responsible for \$1,698.73, and Stephens is responsible for \$2,703.27. Savannah satisfied her responsibility by taking out a student loan. Stephens testified at the February hearing that he had paid for the remainder of Savannah's Fall semester expenses and the majority of her Spring semester expenses. He also introduced documentation indicating that he had taken out a loan for \$3,500, \$1707 of which was disbursed directly to USI each semester,⁵ a bank statement indicating that he paid \$458.64 for Savannah's Fall semester textbooks, and a receipt indicating that he made a payment of \$935.75 to USI towards Savannah's Fall semester tuition and fees. See Tr. at 124 (Respondent's Exhibit 7). In addition, Stephens submitted documents indicating that he gave Savannah approximately \$760 for food and \$750 for clothing and household products during the Fall semester. Despite this testimony and documentary evidence, Elliott's counsel stated at the August hearing that she and Elliott "did not feel or determine that Mr. Stephens had met the twenty-seven hundred dollars." Tr. at 101. Elliott's counsel did not explain how or why she and Elliott arrived at this determination, and we note that $\$1707 + 935.75 + 458.64 + 760 + 750 = \$4,152.75$, well above Stephens's required contribution.⁶

Further, Elliott has not explained, and we fail to see why payments on Savannah's student loan should count against Elliott's obligation. By reducing Savannah's debt, Elliott in no way reduced the amount owed to USI or required by Savannah for food, books, and

⁵ Fees associated with the loan account for the \$86 discrepancy.

⁶ Even if Elliott and her counsel did not believe Stephens's testimony or documents indicating that he had given Savannah \$760 for food and \$750 for household expenses, Stephens introduced receipts and school documents confirming he had made the remaining payments totaling \$2,642.75.

other expenses related to her college education. Elliott's counsel's own statements seem to acknowledge this fact, as she stated that these payments were "simply reducing the child's total obligation." Tr. at 102 (emphasis added). We agree that payments to Savannah's loan company reduced Savannah's obligation to repay the loans. However, we conclude that Elliott's payments do not reduce her responsibility to pay for Savannah's college expenses. Cf. Naggatz v. Beckwith, 809 N.E.2d 899, 902 (Ind. Ct. App. 2004), trans. denied (noting that the Child Support Guidelines indicate that student loans should usually be credited to the obligation of the child, and not the parent); Bendix v. Bendix, 550 N.E.2d 825, 826 (Ind. Ct. App. 1990), trans. denied (recognizing that a parent does not receive credit for child support payments made directly to the child because although the child is the intended beneficiary, the custodial parent is entitled to the payments as a fiduciary).

Savannah took out her loan, which was disbursed to USI, to cover her obligation. Stephens took out a loan, which was also disbursed to USI, gave Savannah money, purchased books, and made payments to USI to cover (and exceed) his obligation. Elliott's payments reduce the amount that Savannah will have to repay upon graduation, but do nothing to cover current expenses. These payments, therefore, constitute gifts to Savannah, and do nothing to reduce Elliott's obligation to pay for Savannah's college expenses. See Grimes v. Grimes, 722 N.E.2d 374, 380 n.8 (Ind. Ct. App. 2000), trans. denied (payments by the father that were not court-ordered were considered gifts, and the father was not entitled to credit for the payments); Fiste v. Fiste, 627 N.E.2d 1368, 1373 (Ind. Ct. App. 1994) ("[A]n obligated parent will not be allowed credit for payments not conforming to the support order."); Bendix, 550 N.E.2d at 826 (parent does not receive credit for child support payments made

directly to child). The payments also cannot be used as credits against Elliott's future obligations relating to Savannah's college expenses.⁷ See State v. Funnell, 622 N.E.2d 189, 191 (Ind. Ct. App. 1993) (“[V]oluntary support payments cannot be applied prospectively to future support obligations.”).

As the above discussion indicates, Elliott's argument that her payments toward Savannah's student loan should satisfy her obligation under the Original Order has no basis in law. Elliott's claim also has no basis in equity. Based on the evidence introduced at the January hearing, Elliott knew, or at the very least should have known, that Stephens had paid the expenses relating to Savannah's college education for the Fall 2005 and Spring 2006 semesters that weren't covered by Savannah's loan. Elliott was also aware, as of May 11, 2006, the date Stephens filed his motion to clarify, that Stephens desired reimbursement for these expenses. Instead of making these payments to Stephens, or waiting until the trial court ruled on Stephens's motion, Elliott chose to pay off Savannah's student loans. Elliott cannot claim that she made payments to Savannah's student loan company with no notice that these payments might not conform to the trial court's order. Any reliance Elliott placed on her interpretation of the Original Order was misguided.

Finally, we disagree with Elliott's position that Stephens should be required to look to Savannah for reimbursement. Obviously, Savannah, like most college students, does not have sufficient funds to pay for her education while enrolled in college. She borrowed money to meet her expenses, anticipating that her college education will enable her to secure

⁷ We might view this situation differently had Elliott made payments directly to USI. Although such payments would not reimburse Stephens for the amounts he had already expended in excess of his obligation, these payments would at least be applied to Savannah's educational expenses, and not to Savannah's personal

employment to repay her debt in the future. Elliott's payments may reduce Savannah's future burden, but they neither reduce her present burden nor further the purpose of court-ordered payments for education expenses: ensuring that a child is able to attend college while allocating the cost of such attendance among the child and both parents. See Naggatz, 809 N.E.2d at 902 (noting that trial courts "'should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expenses, as well as the ability of the student to pay a portion of the expense'" (quoting Ind. Child Support Guideline 6)). Instead, Elliott's payments do not achieve the trial court's desired allocation, as Stephens has incurred far more than his court-ordered share of Savannah's college expenses.

Conclusion

We conclude that Elliott has not demonstrated that the trial court improperly ordered that she must reimburse Stephens for college expenses he advanced due to Elliott's failure to meet her obligation.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.

debt, thereby reducing the amount that Stephens would have to pay in future semesters.